

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LAN THI TRAN NGUYEN,

Plaintiff,

Case No. 2:13-cv-00273-MMD-CWH

ORDER

v.

COLLINS, et al.,

Defendants.

Plaintiff is a prisoner in federal custody. Plaintiff has filed an application to proceed *in forma pauperis* and a *pro se* complaint concerning her prior incarceration at the Nevada Southern Detention Center in Pahrump, Nevada.

I. APPLICATION TO PROCEED *IN FORMA PAUPERIS*

Plaintiff has filed an application to proceed *in forma pauperis*. (Dkt. no. 1). However, on February 22, 2013, plaintiff paid the Clerk of Court the full filing fee of \$350.00 for this action. (Dkt. no. 5). As such, plaintiff's motion to proceed *in forma pauperis* is denied as moot.

II. MOTIONS FOR APPOINTMENT OF COUNSEL

Plaintiff has filed two motions for the appointment of counsel. (Dkt. nos. 2 & 4). A litigant in a civil rights action does not have a Sixth Amendment right to appointed counsel. *Storseth v. Spellman*, 654 F.2d 1349, 13253 (9th Cir. 1981). In very limited circumstances, federal courts are empowered to request an attorney to represent an indigent civil litigant. The circumstances in which a court will make such a request,

however, are exceedingly rare, and the court will make the request under only extraordinary circumstances. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 799-800 (9th Cir. 1986); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). A finding of such exceptional circumstances requires that the court evaluate both the likelihood of success on the merits and the plaintiff's ability to articulate his claims in pro se in light of the complexity of the legal issues involved. In the instant case, the Court does not find exceptional circumstances that warrant the appointment of counsel. Plaintiff's motions for the appointment of counsel are denied.

III. SCREENING STANDARD

Notwithstanding any filing fee that has been paid, the complaint is subject to *sua sponte* dismissal by the Court to the extent it contains claims that are "frivolous, malicious, fail to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Dismissal of a complaint for failure to state a claim upon which relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. See *Cato v. United States*, 70 F.3d. 1103, 1106 (9th Cir. 1995).

Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all allegations of material fact stated in the complaint, and the court construes them in the light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent

1 standards than formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5,
 2 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). While the standard
 3 under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide
 4 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
 5 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient.
 6 *Id.*; see *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

7 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
 8 that, because they are no more than mere conclusions, are not entitled to the
 9 assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal
 10 conclusions can provide the framework of a complaint, they must be supported with
 11 factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should
 12 assume their veracity and then determine whether they plausibly give rise to an
 13 entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim for
 14 relief [is] a context-specific task that requires the reviewing court to draw on its judicial
 15 experience and common sense.” *Id.*

16 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
 17 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
 18 includes claims based on legal conclusions that are untenable (e.g., claims against
 19 defendants who are immune from suit or claims of infringement of a legal interest which
 20 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
 21 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28
 22 (1989); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

23 **IV. SCREENING OF THE COMPLAINT**

24 Plaintiff is a prisoner in federal custody. In the complaint, plaintiff alleges that
 25 she and other inmates were subjected to unconstitutional conditions of confinement,
 26 including inadequate medical care, improper hygiene, and other unfavorable conditions
 27 of confinement while incarcerated at the Nevada Southern Detention Center, located in
 28 Pahrump, Nevada. Plaintiff seeks to bring action against Warden Collins and Unit

1 Manager Holland of the Nevada Southern Detention Center. Plaintiff seeks damages
2 against defendants.

3 As an initial matter, plaintiff seeks to bring this action in a representative capacity
4 as a class action lawsuit. *Pro se* litigants have the right to plead and conduct their own
5 cases personally. See 28 U.S.C. § 1654. However, *pro se* litigants have no authority to
6 represent anyone other than themselves. See *Simon v. Hartford Life, Inc.*, 546 F.3d
7 661, 664 (9th Cir. 2008); *Cato v. United States*, 70 F.3d 1103, 1105 n.1 (9th Cir. 1995);
8 *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987); *Church of*
9 *the New Testament v. United States*, 783 F.2d 771, 773 (9th Cir. 1986); *McShane v.*
10 *United States*, 336 F.2d 286, 288 (9th Cir. 1966). Moreover, plaintiff cannot meet the
11 requirements for class certification required by Rule 23 of the Federal Rules of Civil
12 Procedure. As such, the Court construes the complaint and all allegations made therein
13 as applicable to plaintiff Nguyen only.

14 The Court notes that although plaintiff purportedly brings this action under 42
15 U.S.C. § 1983, the Court construes the complaint as seeking relief under *Bivens v. Six*
16 *Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Bivens* established that
17 “compensable injury to a constitutionally protected interest [by federal officials alleged to
18 have acted under color of federal law] could be vindicated by a suit for damages
19 invoking the general federal question jurisdiction of the federal courts.” *Butz v.*
20 *Economou*, 438 U.S. 478, 486 (1978).

21 Plaintiff’s allegations concern her conditions of confinement while incarcerated at
22 a private facility, the Nevada Southern Detention Center, which is owned and operated
23 by the Corrections Corporation of America pursuant to a contractual services agreement
24 with the U.S. Marshal’s Service. However, *Bivens* does not provide a remedy for
25 alleged wrongs committed by a private entity alleged to have denied plaintiff’s
26 constitutional rights under color of federal law. *Corrections Services Corp. v. Malesko*,
27 534 U.S. 61, 69 (2001). Additionally, the United States Supreme Court has held that a
28 prisoner cannot bring a *Bivens* action against an employee of a private entity for

1 damages pursuant to alleged Eighth Amendment violations. *Minneci v. Pollard*, — U.S.
2 —, —, 132 S.Ct. 617, 626 (2012). In *Minneci*, the Supreme Court held that:

3 [W]here . . . a federal prisoner seeks damages from privately employed
4 personnel working at a privately operated federal prison, where the
5 conduct allegedly amounts to a violation of the Eighth Amendment, and
6 where that conduct is of the kind that typically falls within the scope of
7 traditional state tort law (such as the conduct involving improper medical
8 care at issue here), the prisoner must seek a remedy under state tort law.
9 We cannot imply a *Bivens* remedy in such a case.

10 *Id.* at 626. Here, plaintiff asserts Eighth Amendment claims based on allegations of
11 inadequate medical care and unconstitutional conditions of confinement, seeking
12 damages from defendants who are employees of a private prison. Plaintiff has a tort
13 remedy under Nevada state tort law. See Nev. Rev. Stat. 41A, et seq. While plaintiff
14 may be able to raise her claims against defendants as a tort claim in state court, the
15 claims are not cognizable as a civil rights action in federal court. As such, the complaint
16 is dismissed with prejudice, as amendment would be futile.

17 **V. CONCLUSION**

18 IT IS THEREFORE ORDERED that plaintiff's application to proceed *in forma*
19 *pauperis* (dkt. no. 1) is DENIED as moot.

20 IT IS FURTHER ORDERED that plaintiff's motions for the appointment of
21 counsel (dkt. nos. 2 & 4) are DENIED.

22 IT IS FURTHER ORDERED that the complaint is DISMISSED WITH
23 PREJUDICE, in its entirety, for failure to state a claim.

24 IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment
25 accordingly.

26 IT IS FURTHER ORDERED that this Court CERTIFIES that any *in forma*
27 *pauperis* appeal from this order would not be taken in good faith. See 28 U.S.C. §
28 1915(a)(3).

DATED THIS 26th day of April 2013.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE